BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of United Power Line Council Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service	)	WC Docket No. 06-10

To: Chief, Wireline Competition Bureau

REPLY COMMENTS OF DUKE ENERGY CORPORATION

Pursuant to the Public Notice of the Federal Communications Commission ("FCC" or "Commission"),[1] Duke Energy Corporation ("Duke"), by and through its undersigned attorneys, hereby submits these reply comments in the above-captioned proceeding in support of the Petition for Declaratory Ruling filed by the United Power Line Council ("UPLC") and in response to the Comments filed in this docket.

I. DISCUSSION

A. The Record Supports FCC Approval of UPLC's Petition

The comments by utilities experienced in the challenges of deploying Access Broadband over Power Lines ("BPL") illustrate that in order to realize the technology's potential, regulatory certainty is required.[2] Granting UPLC's request will provide a "level regulatory playing field"

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[1] *Pleading Cycle Established for Comments on United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, DA 06-49 (Jan. 11, 2006).

[2] *See, e.g.*, Comments of Progress Energy at 2 (filed Feb. 10, 2006) ("Progress"); Comments of San Diego Gas and Electric at 3, 4 (filed Feb. 10, 2006) ("SDG&E"); Comments of UPLC at

by treating like technologies alike, and will allow investors the confidence needed to support this promising nascent technology.[3] Indeed, although some parties suggest that such a classification is premature and should be stayed until more wide–spread commercial deployment is attained,[4] without the relief requested such deployment may never be achieved. It is, therefore, appropriate and necessary for the FCC to act now. As UPLC's comments on its own Petition show, the record in this and other BPL-related dockets is sufficient for the FCC to determine the regulatory classification for BPL service and to act on UPLC's request to classify BPL as an interstate information service.[5] Such action by the FCC to classify BPL as an interstate information service would be fully consistent with the FCC's position on cable modem services and DSL services.[6]

1-2 (filed Feb. 10, 2006) ("UPLC"). All comments cited herein were filed in WC Docket No. 06-10 unless otherwise specified.

[3] UPLC at 9-11; Comments of the Telecommunications Industry Association at 3-4 (filed Feb. 10, 2006) ("TIA") ("TIA believes the only possible determination regarding the classification of BPL-enabled Internet access is a finding that it is an information service under the Communications Act, as amended. Broadband Internet access provided over BPL is a service that clearly is functionally and technically comparable to cable modem and wireline broadband Internet access services; therefore, its network providers, technology suppliers, investors and consumers deserve the same regulatory clarity now enjoyed by the latter."); Comments of First Communications, LLC at 7 (filed Feb. 10, 2006) ("First Communications").

[4] *See, e.g.*, Comments of National Telecommunications Cooperative Association at 1, 5-6 (filed Feb. 10, 2006) ("NTCA"). Duke also notes that NTCA's comments confuse the issue, in that it seeks a ruling on a "specific form of BPL" along the lines of the AT&T declaratory ruling. BPL, however, is not an application like Voice over Internet Protocol ("VoIP") which utilizes a broadband connection to provide services. Rather, it is broadband access itself. NTCA's comments, therefore, are inapposite.

[5] UPLC at 7-8.

[6] *Notice of Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, GN Docket No. 00-185, 17 FCC Rcd 4798, 4826 (2002) ("*Cable Modem Declaratory Ruling*"), *aff'd sub. nom. National Cable & Telecomms. Ass'n v. Brand X Internet Svcs.*, 125 S. Ct. 2688 (2005); *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities,* Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14902 (2005) ("*DSL Order*").

Duke also concurs with First Communications' suggestion that the FCC should explicitly find that BPL has no separate transmission component, and that neither electric utilities nor their BPL operators are required to offer transmission capacity separately to others.[7] This is particularly critical in light of the medium used by BPL – electrical distribution lines – in that utilities must continue to safeguard the Nation's electrical infrastructure by exercising control over whether, how, and by whom BPL systems are deployed and operated.[8] This is also consistent with the FCC's deregulation of the high speed, high capacity infrastructure of wireline carriers,[9] and its position that requiring "open" or mandatory access to cable facilities is contrary to the public interest and unwarranted based on existing market incentives.[10]

B. Requests that Exceed the Scope of UPLC's Petition Should be Disregarded

As described below, a number of commenters have sought to inject subjects into this docket that far exceed the scope of the declaratory ruling requested by UPLC. Proponents of these suggestions do not have any serious objection to the classification of BPL as an information service (and in fact suggest such a classification is appropriate),[11] but rather seek to advance unrelated and self-serving agendas as conditions to the FCC's classification decision.

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[7] First Communications at 9; *See also*, *Cable Modem Declaratory Ruling*, *DSL Order*, *supra*.

[8] First Communications at 9.

[9] *See, e.g., In re Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290 (rel. Feb. 4, 2005).

[10] *See, Cable Modem Declaratory Ruling* at 4826.

[11] *See, e.g.*, Joint Comments of Florida Cable & Telecommunications Association, Cable Television Association of Georgia, Cable Telecommunications Association of Maryland, Delaware and the District of Columbia, California Cable & Telecommunications Association, South Carolina Cable Television Association, and Alabama Cable Telecommunications Association at 7 (filed Feb. 10, 2006) ("Cable Commenters") ("...classifying BPL as an information service would be consistent with the Commission's classifications of cable modem and DSL services..."); Comments of Panasonic at 1 (filed Feb. 10, 2006) ("Panasonic").

These issues are, however, inappropriate in this context and the FCC does not need to consider them in deciding whether to grant the ruling requested by UPLC. Accordingly, these suggestions should be rejected.[12]

1. Requests to Require Expansion of Pole Capacity are Inappropriate and Unlawful

A coalition of cable television associations suggests that the FCC's classification of BPL as an interstate information service also requires the FCC to expand the rights of third-parties seeking to attach facilities to utility-owned or controlled distribution facilities.[13] This request, however, flies in the face of the plain language of the Pole Attachments Act and the Eleventh Circuit's decision in *Southern Company v. FCC*.[14] In particular, the Cable Commenters suggest that BPL classification should be "conditioned upon a finding that utilities may not claim 224(f)(2) capacity exemptions."[15] There is absolutely no precedent for such a suggestion, and the FCC would clearly be acting *ultra vires* if it required a broadband provider to cede its statutory rights in order to gain regulatory parity with comparable technologies. That the Cable Commenters would even suggest such a condition reveals their own anticompetitive motives to constrain utilities from offering competitive BPL services under the threat of becoming the captive contractor for providing unlimited capacity and providing even greater subsidies to the

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[12] *See, e.g., In re North American Numbering Plan Administration; NeuStar, Inc., Request to Allow Certain Transactions Without Prior Commission Approval and to Transfer Ownership*, 19 FCC Rcd 16982, at n. 24 (Aug. 23, 2004) (declining to address suggestions outside the scope of the proceeding that were pending in another docket); *See also, In re Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457 at n. 58 (April 21, 2004) (declining to address issues outside the scope of the requested declaratory ruling).

[13] *See generally,* Cable Commenters.

[14] *Southern Co. v. FCC*, 193 F.3d 1338 (11th Cir. 2002) ("*Southern Company*").

[15] Cable Commenters at 8.

cable industry. Such self-serving, anticompetitive comments do not merit any consideration by this Commission.

The FCC should also decline the Cable Commenters further invitation to run roughshod over the language of Section 224 and to redefine the statutory term "capacity" to effectively read it out of the statute. The Cable Commeters are seeking to have the FCC re-impose the capacity expansion requirements of the *Local Competition Order on Reconsideration* that were rejected by the Eleventh Circuit,[16] in that they suggest that the utility must agree to change out distribution poles, including providing taller poles, to facilitate new attachments.[17] Specifically, the FCC's *Local Competition Order on Reconsideration* had stated that "[T]he principle of nondiscrimination established by section 224(f)(1) requires a utility to take all reasonable steps to expand capacity to accommodate requests for attachment just as it would expand capacity to meet its own needs."[18] As the Eleventh Circuit concluded, however, "[i]f utilities are required to expand the capacity of their plant at the request of a third party, 'it is hard to see how you can give section 224(f)(2) any meaning at all . . . ."[19] In fact, in *Southern Company*, the FCC made precisely the same argument to the court as the Cable Commenters raise here, suggesting that mandatory capacity expansion was necessary in part because utilities were entering into the telecommunications industry and thereby had an incentive to discriminate. This rationale was soundly rejected by the Eleventh Circuit as "contrary to the plain language of § 224(f)(2)."[20]

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[16] 14 FCC Rcd 18049 (1999); *Southern Company, supra.*

[17] Cable Commenters at 3.

[18] Order on Reconsideration, 14 FCC Rcd. 18049, para. 51 (Oct. 20, 1999).

[19] *Southern Co.* at 1346, *citing* Order on Reconsideration, 14 FCC Rcd. at 18099 (Powell, Comm'r, concurring in part and dissenting in part).

[20] *Southern Co.* at 1346 ("The FCC counters this argument by noting that many utilities now use their poles to support thriving telecommunications businesses of their own (ten of the thirteen petitioners own or have financial involvement in telecommunications businesses), and

The FCC should decline to go down the same path with BPL that was previously rejected on appeal with respect to telecommunications services.

Moreover, even if the Commission were to consider the Cable Commenters' suggestions, their requests must still be rejected as they go beyond the scope of the pending Petition, and should not be considered by the Commission in conjunction with UPLC's request. Rather, these comments are really second attempts to address the pending *Fibertech* Petition for Rulemaking.[21] Two other commenters, NextG and Virtual Hipster, also attempt to use this proceeding as a second bite at the Fibertech apple.[22] Indeed, NextG goes so far as to attach its comments from the *Fibertech* docket.[23] Clearly, these issues already have an appropriate forum, which is not this proceeding.

2. Interference Issues Have Already Been Addressed and Need Not Be Considered Here

Virtual Hipster suggests that the FCC should "open a broader rulemaking" to consider potential interference issues for unlicensed devices with respect to future BPL technologies.[24] This request is clearly beyond the scope of the current declaratory ruling request, and is not

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suggests that the nondiscrimination principle that motivated the 1996 Telecommunications Act mandates that the FCC prohibit a utility from "favor[ing] itself over other parties with respect to the provision of telecommunications or video programming services." The rule on expansion of capacity, according to the FCC, is simply one manner in which the FCC implements Congress's intent to prevent utilities from exploiting their monopoly ownership of the necessary infrastructure to deny competitors access to their markets. The FCC merely mandates that utilities make room for third parties in the same manner in which they would if they needed additional space for their telecommunications operations. The FCC's position is contrary to the plain language of § 224(f)(2).") (internal citations omitted).

[21] *See*, *In re Petition for Rulemaking of Fibertech Networks, LLC*, RM-11303, DA 06-42 (rel. Jan 10, 2006).

[22] Comments of NextG Networks, Inc. at 2 (filed Feb. 10, 2006) ("NextG"). Comments of Virtual Hipster at 4 (filed Feb. 10, 2006) ("Virtual Hipster").

[23] NextG at 2, Ex. 1.

[24] Virtual Hipster at 4.

necessary to consider in order to rule on UPLC's request. Moreover, interference issues associated with BPL have already been addressed in depth[25] and are not appropriately subject to review in this proceeding. Virtual Hipster's request, therefore, should be denied.

3. The FCC is Already Addressing the Requested "Social Regulation"

COMPTEL opines that the FCC must complete its determinations as to what "social regulation" will apply to information service providers *before* BPL is classified as such.[26] UPLC is not, however, advocating a "regulatory vacuum" as COMPTEL suggests.[27] Rather, UPLC is simply seeking affirmative guidance in the form of a declaratory ruling as to the type of regulation that will apply. This is consistent with the FCC's approach with respect to cable modem services and DSL, in that it classified the service *first,* and then instituted rulemaking to address the obligations of the provider in connection with that classification. Even where such regulation is still under consideration by the Commission, as is the case for broadband interstate information services, knowing the regulatory "bucket" into which the technology will fall will provide needed clarification for the industry.

The FCC declined to impose "social regulation" in connection with the declaratory rulings classifying cable modem and DSL services, and should decline to do so here as well. These social issues are pending in a variety of other dockets,[28] and need not be addressed at this

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[25] *In re Carrier Current Systems, including Broadband over Power Line Systems and Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband over Power Line Systems*, Notice of Proposed Rulemaking, ET Docket Nos. 03-104 and 04-37, 19 FCC Rcd 3335 (2004) (" *BPL NPRM*"). Virtual Hipster also concedes that it is currently employing Part 15 technologies that are required to accept interference. *Id.* at 3.

[26] Comments of COMPTEL at 1-3 (filed Feb. 10, 2006) ("COMPTEL").

[27] Id. at 3.

[28] See, e.g., *In re IP-Enabled Services, Notice of Proposed Rulemaking*, FCC 04-28 (Mar. 10, 2004) (addressing possible regulations related to 911 services, disability access, carrier compensation, universal service, and consumer protection) ("IP-Enabled Services

time in the context of the requested declaratory ruling. Rather, as UPLC stated, it is appropriate to take at least one issue off the table – regulatory classification – in order to provide the regulatory parity and certainty necessary to support the more rapid deployment of the technology.[29] Moreover, UPLC does not seek any forbearance from such regulation as contemplated in these related dockets. It seeks merely to have the classification issue put to rest so that more reasoned and certain decision-making can occur for BPL providers, investors, and broadband consumers. The FCC should focus solely on the classification issue in this docket, and decline to expand the discussion beyond what is immediately before the agency.

With respect to NTCA's related suggestion that the FCC should explore the burden BPL may place on the PSTN and assess whether Universal Service contributions, E-911 or other regulations are appropriate for "BPL–enabled voice services," NTCA confuses the broadband connection provider – Access BPL – with the provider of applications that use broadband connections to provide other services such as VoIP. Further, the questions posed by NTCA are pending in other dockets, and need not be resolved as a prerequisite to determining the appropriate regulatory classification of BPL.[30] NTCA's requests to delay or impose additional conditions before a regulatory classification can be determined, therefore, should be rejected.

4. States Retain Jurisdiction Over Utility Accounting and other State Level Issues

NTCA seeks to artificially inject into this proceeding the fear that the provision of BPL services by utilities will provide "strong incentive to employ cross-subsidies using the electric

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Rulemaking"); *In re Consumer Protection in the Broadband Era*, Notice of Proposed Rulemaking, FCC 05-150 (Sept. 23, 2005).

[29] UPLC at 9.

[30] *IP-Enabled Service Rulemaking, supra.*

distribution system."[31] This is simply not the case. In the first instance, this is not a topic that the FCC can, or should, address. Rather, jurisdiction clearly lies with the State Public Utility Commissions to address utility accounting issues through their general jurisdiction over the utility's practices. Indeed, several states are already investigating how their roles in regulating BPL should be handled, and the best opportunities to facilitate the deployment of BPL while also addressing affiliate transactions, cost allocations, safety and reliability, and other methods of ensuring that consumers of both broadband services and electric services are protected.[32]

The FCC, on the other hand, is jurisdictionally limited to regulation of services governed by the Communications Act, as amended. It would be inappropriate and unlawful for the FCC to seek to govern utility accounting and funding issues in the manner requested by NTCA. NTCA's argument, therefore, is a red herring that is being fully addressed by the appropriate regulatory bodies.

5. The FCC Need Not Adopt any Technical Protocols in This Docket

Panasonic's request that the FCC adopt a "coexistence protocol" as a condition of the FCC classifying BPL as an interstate information service is also inappropriate. Such a standard

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[31] NTCA at 7.

[32] *See, e.g.*, Tex. Utilities Code §§ 43.001 *et seq.* (2005); Neb. Rev. Stat. §§ 86-594 *et seq.*; Draft Decision of Commissioner Chong, *Order Instituting Rulemaking concerning Broadband Over Power Line deployment by electric utilities in California,* Calif. PUC Docket No. 05-09-006 (Filed Sept. 8, 2005), *available at* http://www.cpuc.ca.gov/PUBLISHED/COMMENT_DECISION/53516.htm; *In re application of Consumers Energy Company for authority to increase its rates for the generation and distribution of electricity and other relief,* Case No. U-14347 (Dec. 22, 2005); Order Initiating Proceeding and Inviting Comments, *Proceeding on Motion of the Commission to Examine Issues Related to the Deployment of Broadband over Power Line Technologies*, New York PSC Docket No. 06-M-0043 (January 25, 2006); *In re Development of rules and regulations relating to the deployment of Broadband over Power Lines ("BPL")*, Docket No. R-2970 (La. PSC Official Bull., Jan. 13, 2006); *see also*, The National Association of Regulatory Utility Commissioners, *Report of the Broadband over Power Lines Task Force* (Feb. 2006), *available at* http://www.naruc.org/associations/1773/files/bplreportfinal0206.pdf (last visited Feb. 24, 2006).

is well beyond the scope of the present docket, and is being pursued by the appropriate standards bodies. Specifically, the IEEE P1901 Standards Committee, in which Duke participates, is working on both coexistence and "interoperability" standards and is expected to complete its work by year end. Consideration of such a protocol is not necessary for determining the appropriate regulatory classification for BPL.

II. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, Duke Energy Corporation respectfully requests that the Commission grant UPLC's Request for Declaratory Ruling and find that Access BPL services are interstate information services.

Respectfully submitted,

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Dated: February 27, 2006

CERTIFICATE OF SERVICE

I, Erika E. Olsen, do hereby certify that on the 27th day of February, 2006, a copy of the foregoing Reply Comments of Duke Energy Corporation in the Matter of United Power Line Council Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, was submitted electronically to the Federal Communications Commission and served upon the following by the method indicated:

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